United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF & APPENDIX

75-1037

B P/S

3/31

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Docket No. 75-1037

THE UNITED STATES,

Plaintiff-Appellee,

vs

RAYMOND COUGHLIN, ALBERT GRASSO, CHARLES GREENE and FRED SMITH,

Defendants

CARMINE PICCORA and NEIL PACILIO,

Defendants-Appellants.

BRIEF + appendix FOR DEFENDANTS-APPELLANTS
CARMINE PICCORA and NEIL PACILIO

Anthony N. Del Rosso
Attorney for Defendants-Appellants
Carmine Piccora and Neil Pacilio
1055 Franklin Avenue
Garden City, New York 11530

3

PAGINATION AS IN ORIGINAL COPY

TABLES OF CONTENTS

TABLE OF CASES

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

THE UNITED STATES,

Plaintiff-Appellee,

vs

RAYMOND COUGHLIN, ALBERT GRASSO, CHARLES GREENE and FRED SMITH,

Defendants

CARMINE PICCORA and NEIL PACILIO,

Defendants-Appellants.

BRIEF FOR DEFENDANTS-APPELLANTS
CARMINE PICCORA and NEIL PACILIO

SUMMARY OF ARGUMENT

POINT I: THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN TAKING NO STEPS TO REMOVE AND, IN FACT, IN REENFORCING A DE FACTO TIME LIMIT ON JURY DELIBERATIONS

POINT II: THE ADMISSION OF TESTIMONY RELATING TO CRIMINAL ACTS OCCURRING PRIOR TO 1972 AND AGAINST CERTAIN DEFENDANTS IN THE ABSENCE OF A CLEAR PRELIMINARY FINDING BY A FAIR PREPONDERANCE OF THE EVIDENCE THAT (1) A CONSPIRACY EXISTED BETWEEN 19 4 AND 1972 WHICH (2) CONTINUED AND (3) THAT CERTAIN

DEFENDANTS WERE CONNECTED WITH IT CONSITUTED REVERSIBLE ERROR

POINT I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR IN TAKING NO STEPS TO REMOVE AND, IN FACT, IN REENFORCING A DE FACTO TIME LIMIT ON JURY DELIBERATIONS

FACTS

Trial of this case began on May 13, 1974. On May 15, after a hearing and jury selection, three jurors sought to withdraw for personal reasons. Although their absence would deprive the court of the benefit of alternate jurors, the three were excused. The government's attorney cautioned;

> " MR. RITCHIE: This case could go on three weeks. With twelve jurors we are in a great deal of trouble. Mr. Rosen and I in speaking were speculating about the possibility of awaiting the new panel on Monday. . ." (TR at 7, emplasis supplied).

Defense attorney Rosen objected to the trial proceeding without alternate jurors. Nevertheless, the court directed that the trial continue and it lasted fully twelve weeks.

At the beginning of the eleventh week problems such as those anticipated by counsel began to materialize. Three of the jurors had vacation plans which were imperiled by the still-continuing trail. To resolve this difficulty the court engaged in the following discussion with juror no. 5.

> " THE COURT: We are almost certain that we are going to finish some day this week with the Government's case. Then, of course, the defendants have a right to be represented, you recognize that, and they have a right to try their case too.

I don't know what they're going to do with the case, and I don't ask them; it's none of my business and no one else's, but from all indications, usually that side of the case goes quite rapidly.

If we didn't finish on Friday, more that likely we would finish by Monday or Tuesday of the following week. You will give me until Tuesday?

JUROR NO. 5: Yes.

THE COURT: How does that sound?

JUROR NO. 5: That is fine with me, Judge.

MR. ROSEN: That is very fair, Judge.

THE COURT: That is my promise to you. If it's not, you are going to be leaving -- Tuesday will be the last day you are here. You will be leaving on Wednesday, I make that promise to you." (TR at 3952-3953, emphasis supplied).

The promise was then reiterated to juror no. 11;

" THE COURT: We are trying to work out a schedule. We are not doing too well but we are doing somewhat better. We hope to have the case, the Government's case, finished sometime early this week and the defendant's case started. I told the other juror --

JUROR NO. 11: Helen?

THE COURT: Yes. I promised her by Tuesday the case would be over and they would be out of here by Wednesday next week. Is that all right with you, too?

JUROR NO. 11: That will be okay." (TR at 3954, emphasis supplied).

In an all too apparent effort to keep its promise the court pushed the trial forward holding late night sessions on both Friday, July 19th and Monday, July 22nd. On the latter occasion summations continued past eleven in the evening. Meanwhile the court informed the government's attorney of the following;

" THE COURT: Mr. McGuire, all I want to advise you is that the overnight period, we have this jury -- we have three of them who said they will not come back to this court on Wednesday, we have two who are going out of the country Wednesday morning, we will

> not be able to get them, and I am not pressing, I couldn't care if it lasted another week, it doesn't bother me, that is not my problem." (TR at 4773-4774).

And revealing its own attitude, the court added;

> "I am saying to you, I don't want to go through a whole 12 weeks of trial when I am ready to submit a case to a Jury and then lose it. You understand that." (TR at 4775).

Meanwhile defense counsel warned of the danger of a compromise verdict from jurors anxious to be on their way. (TR at 4788).

On Tuesday, July 23rd the Court instructed the jury commencing at 11:50 in the morning. Deliberations began at 12:40 p.m. Following the rereading of testimony at 6:00 p.m., a verdict was rendered at 9:50 p.m.

CASE LAW DISCUSSION

In the Federal courts the rule that no time limit, whether express or implied, should be placed on jury deliberations prevails. (United States v. Lansdown, 460 F. 2d 164 (4th Cir., 1972); United States v. Flannery, 451 F. 2d 880, 883 (1971); Goff v. United States, 446 F. 2d 623, 626 (10th Cir., 1971); United States v. Diamond, 430 F. 2d 688 (5th Cir., 1970). The same rule obtains in State courts as well. (Wade v. State, 155 Miss. 648; People v. Hill, 44 A D 2d 813; Commonwealth v. Kennedy, 189 Pa. Super. 189, 323 A 2d 384; People v. Crowley, 224 P. 2d 748 (Cal. Dist. Ct. of App., 1950)). The defendants respectfully submit that this rule was violated in the instant case by virtue of a de facto time limitation. When the jury was given the case at 12:40 p.m. on Tuesday, July 23, 1974, at least two jurors knew that deliberations would not continue past that evening.

In denying the defendants' motion for a new trial, the District Court wrote; "The issue whether a trial judge coerced a jury ordinarily

arises in the context of an improper charge immediately prior to, or in the midst of deliberations." (United States v. Piccora, E.D.N.Y., Ind. No. 73-CR-827, dec. Dec. 27, 1974). The rule against fixed time limitations on jury deliberations, however, is neither limited to nor does it owe its origins to such cases.

> "Every judge knows the dread with which the average juror approaches the contemplation of being compelled to remain confined within the average courthouse during the long and unpleasant hours from Saturday night to Monday morning . . . . Every lawyer who has ever had intrusted to his care, over any considerable period of years, the interests of property of any consequence or the lives or liberties of clients charged with serious offenses, will recall the anxiety and apprehension with which he has seen an important case go to the jury on Saturday afternoon." (Wade v. State, supra at 805-806).

It is the real, though perhaps not quite so dramatic, pressure that sequestration exerts on jury deliberations that the rule against even such de facto time limitations as the approach of a weekend seeks to avoid. Thus in United States v. Flannery, supra at 883, the Circuit Court of Appeals held; "First, the court erred in reminding the jury that it was Friday afternoon. (citation omitted). The implicit suggestion, although doubtless unintended, was that it was more important to be quick than to be thoughtful." In sum, a court need not say in so many words that the jury has x hours to deliberate in order to violate the prohibition on time limits.

The evil of time limits was fully, if somewhat prosaically, discussed in Wade v. State, supra at 80[illegible];

> "The rule as expressed is not only practicable, but it is sound from every standpoint. For instance, if there be a person on the jury who is there with the purpose to accomplish a certain result, a person commonly known as a 'sinker', when the judge allows it to be known that the jury will be discharged at some reasonably short future time, the sinker will be the more certain to hold out until

> the fixed time shall arrive, whereas on the other hand, if there be one or more who are holding out from the purest and most conscientious motives, and the judge fixes the time at a far distant hour or time, the conscientious juror or minority may at once surrender rather than submit to the ordeal of such a length or perseverance. But, when no time or intimation of time is given, the objectionable features just mentioned are thereby minimized so far as possible, and, indeed, may disappear altogether."

A fixed time limit destroys the ideal balance among jurors. It furnishes some with additional weaponary while depriving others of the arms they would normally possess. It destroys the calm atmosphere of dispassionate deliberations.

Here the court was made aware of a potentially coercive situation: the vacation plans of three jurors were being threatened by the continuing trial. Rather than ameliorating the problem, the court exacerbated it by fixing a firm deadline. The pressure of vacation plans was not removed but strengthened. The jurors were not told to cancel their plans, but to make them firm for date certain.

In denying the defendants' motion for a new trial, the court below, citing United States v. Miller, 478 F. 2d 1315, 1320 (2d Cir., 1973), held that its promise must be considered in context and offered as part of that context its statements during jury selection. The holding in Miller, however, was that an instruction must be considered in the context of "other statements delivered at the same time." (emphasis supplied). Eleven weeks separated jury selection from the promise here in question. Certainly statements made at such diverse times cannot constitute parts of the same context. Neither was any instruction[1] given nor is there any other factor in the context surrounding the court's promise which in any way ameliorates its impact. On the contrary, the context of the promise consists of two late night court sessions which

reenforced the court's promise and gave concrete evidence of the court's intention to hold to its word.

Standing at the very threshold of a prison cell and armed with concrete evidence to the contrary, some would have these defendants assume that a jury honors all instructions given it and is immune to influence from extraneous considerations. Shy on logic, advocates have often in the past been forced to resort to invocations of blind faith, but usually reason has prevailed. (Bruton v. United States, 391 U S 123; Jackson v. Denno, 378 U S 368). Certainly, such an empty assumption cannot prevail over an established and logical rule against time limitations on jury deliberations.

An examination of the trial record reveals more than one instance of the court admonishing the prosecutor for unnecessary delay and irrelevant questions. There are few, if any, instances of such admonitions directed to defense counsel. Nevertheless, in denying the defendants' motion for a new trial the court asserted that the defendants bore equal responsibility for the trial taking twelve and

1. The only relevant jury instruction given in the instant case was the following:

> " Now, in this type of case there must be a unanimous verdict, that means all twelve of you must agree, and it goes without saying, that it becomes incumbent upon you to listen to one another and to argue out the points among yourselves in order to determine in good conscience whether your fellow jurors' argument is one commensurate with yours or whether at least you can agree with him. You have no right to stubbornly and idly sit by and say, "I am not talking to anyone," "I am not going to discuss it," because people with common sense and the ability to reason must communicate, they must communicate their thoughts." (TR at 4969-4970).

not three weeks. Insofar as responsibility for delay is at all relevant here, the defendants are content to let the record speak for itself.

In sum, the well established rule against express or de facto time limits on jury deliberations requires a reversal of all convictions arising out the trial of the instant case. There is no reason why this rule should not be applied in this case.

THE JUROR'S AFFIDAVIT

Solely to combat the tendency to say "so what" about the fixing of time limits on jury deliberations, the defendants submitted a juror's affidavit to show that the very evils the rule seeks to avoid occurred in the instant case. (See, Appendix A). The defendants conceded that courts should not become; "Penelopes, forever engaged in unraveling the webs they wove." (Jorgenson v. York Ice Machinery Corp., 160 F. 2d 432, 435). Nevertheless, the government's attorneys and the court below focused upon the relevance of this affidavit as if it were a major issue in this case. It is not.

There is only one way to prove that actual coercion resulted from the fixing of a time limit on jury deliberations: an affidavit from a juror. If the proper functioning of the jury system requires that the secrecy of the jury room not be violated, then coercion must be presumed to result from the fixing of a time limit. Other than by such a presumption, a defendant has no way of protecting himself against coercion.

It is not essential to the defendants' argument that the court consider the juror's affidavit, but fundamental fairness requires that the proof of actual coercion be considered or that coercion be presumed from the mere fixing of a time limit.

CONCLUSION AS TO POINT I

If the court had merely submitted this case to the jury knowing of the de facto deadline arising out of the jurors' vacation plans, it would have been reverisble error. Here the error is even more grievous because the court actually reenforced the deadline by its promise and its conduct.

POINT II

THE ADMISSION OF TESTIMONY RELATING TO CRIMINAL ACTS OCCURRING PRIOR TO 1972 AND AGAINST CERTAIN DEFENDANTS IN THE ABSENCE OF A CLEAR PRELIMINARY FINDING BY A FAIR PREPONDERANCE OF THE EVIDENCE THAT (1) A CONSPIRACY EXISTED BETWEEN 19 4 AND 1972 WHICH (2) CONTINUED AND (3) THAT CERTAIN DEFENDANTS WERE CONNECTED WITH IT CONSTITUTED REVERSIBLE ERROR

FACTS

During the trial several government witnesses, and in particular the witness Valentine, were permitted to testify about criminal activities which occurred between 19 4 and 1972. Some testimony was also received in relation to criminal activities in the post-1972 period which was unconnected with the alleged conspiracy.

The pre-1972 criminal activities involved cargo thefts and were connected with the Frigid yard. They were, thus, similar to the pertinent post-1972 crimes alleged in the indictment. However, while there was a coincidence as to a few of the participants, no continuity was ever established. Two such individuals, Valentine and Bencivenga, left the Frigid yard during the 19 4 - 1972 period. Others, such as Fred Smith, though remaining at Frigid during the whole period, had

no role in the pre-1972 events. Despite this lack of connection or relevance, testimony about such events as the stripping of Pier 42 received.

Even as to the post-1972 events the evidence of the involvement of some of the defendants was sketchy at best. In this regard, the only preliminary finding made by the court was the following:

> " All right. Now, as to the conspiracy testimony, the Court has reviewed the record last evening and this morning, and the testimony that was given by Mr. Bencivenga, the Court finds on the balance of the testimony on page 1789 after reviewing minutes, that the -- it does substantiate that a conspiracy has been created at that time, and the mention of the names of Mr. Bencivenga, Mr. John Macchirole, Neil Pacilio, Fred Simth and Alfred Smith and, therefore, they being co-conspirators the testimony will be permitted and admissible." (TR at 1840).

The testimony referred to as appearing on page 1789, insofar as it is relevant, was the following by Mr. Bencivenga and relating to events of the year 1972;

> "Answer. Neil called Freddie and Alfred over and he told them to show their tallies, they just came back from Pier 11 and the tallies were altered, Freddie and Al explained what they had done; so Neil told them I would be in charge of his trucks and they would be working for me and anything they stole would have to come to me and Johnny told me anything they gave me I qould give to Neil and we would work it like that.
>
> Question. Who is this individual Alfred?
>
> Answer. Freddie's brother.
>
> Question. Is John Macchirole present during this conversation with Freddie and Alfred?
>
> Answer. Yes." (TR at 1789).

CASE LAW DISCUSSION

The defendants respectfully suggest that the trial court's ruling that sufficient evidence had been adduced to permit the introduction of hearsay testimony under the co-conspirator exception was inadequate as to those defendants other than Neil Pacilio, Fred Smith and Alfred Smith and as to pre-1972 events.

The statements of one co-conspirator are admissible in evidence against a co-conspirator notwithstanding the general rule against hearsay. (Dutton v. Evans, 400 U S 74, 81). As a prerequisite to admissibility, however, the court must be presented with substantial evidence of the existence of the conspiracy and such evidence must be derived from an independent source. (United States v. Nixon, 418 U S 83, 701). The court must find by a fair preponderance of the evidence (1) that a conspiracy existed and (2) that each individual defendant was connected with it. (United States v. Gainey, 417 F. 2d 1116 (2d Cir., 1969); United States v. Costello, 352 F. 2d 848 (2d Cir., 1965)). "(I)n assessing the evidence of the existence of a conspiracy and each defendant's connection with it, hearsay statements of other alleged co-conspirators (including co-defendants) must be excluded from consideration." (United States v. De Cavalcante, 440 F. 2d 1264, 1273 (3rd Cir., 1971)).

Strictly construed, the only preliminary finding by the trial court in the instant case was that there was adequate evidence of a post-1972 conspiracy among Neil Pacilio, Fred Smith, Alfred Smith, Whitey Bencivenga and John Macchirole. No mention is made of the other defendants or of a pre-1972 conspiracy. Yet, irrelevant and hearsay testimony was admitted into evidence against the other defendants and about pre-1972 events.

The failure of the trial court to find by a fair preponderandce of the evidence either that a conspiracy existed prior to 1972 or that each of the other defendants was connected with any conspiracy was highly prejudicial. It exaggerated a problem already existent in any conspiracy prosecution such as that involved here.

> "The basic difficulty arises in applying the seventeenth century notion of conspiracy, where the gravamen of the offense was the making of an agreement to commit a readily identifiable crime or series of crimes, such as murder or robbery (See, "Developments in Law -- Criminal Conspiracy," 72 Harv. L. Rev. 922, 923 (1959)), to what in substance is the conduct of an illegal business over a period of years. There has been a tendency in such cases "to deal with the crime of conspiracy as though it were a group of men rather than an act" of agreement." (United States v. Borelli, 336 F. 2d 276, 384 (2d Cir., 1964)).

Stripped of their individuality the defendants were lumped into a group and then the group was credited with a myrid of unrelated thefts of cargo in the period between 1964 and 1972. No evidence established either a continuity of agreement or of participants. (See Kotteakos v. United States, 328 U S 750; United States v. Chase, 372 F. 2d 453 (4th Cir., 1967)).

Without adequate procedural safeguards the defendants were cast into an aura of criminality and made associates of certain individuals who claimed lengthy criminal careers. Tarred as they were by unrelated crimes and criminals, what was said of the defendants in United States v. Vaught, 485 F. 2d 320, 323-324 (4th Cir., 1973), is equally applicable to the defendants in the instant case;

> " The admission of this mass of inadmissible, irrelevant and highly prejudicial testimony unfairly permitted the prosecution to paint (the defendants) before the jury as bad men associating with a criminal companion. United States v. Tomaiolo, 249 F. 2d 683 (2d Cir., 1957). We think the prejudice resulting from the admission of this evidence so permeated and tainted the entire trial so as to require a reversal of the convictions . . . ."

The defendants respectfully submit that their convictions should be reversed because of the reception of testimony about pre-1972 crimes and because of the reception of hearsay testimony against certain of their number without a preliminary finding or any evidence (1) that a pre-1972 conspiracy existed or (2) that certain of the defendants were connected with any post-1972 conspiracy.

CONCLUSION AS TO POINT II

The failure of the trial court to make a preliminary finding that there existed a conspiracy between 1964 and 1972 which continued through 1972 or that any defendants other than Neil Pacilio, Fred Smith and Alfred Smith were connected with such a conspiracy renders the admission of testimony about pre-1972 events and the admission of all hearsay testimony against the unconnected defendants reversible error.

Respectfully submitted,

Anthony N. Del Rosso
Attorney for Defendants-Appellants
Carmine Piccora and Neil Pacilio

APPENDIX A (AFFIDAVIT)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------x
THE UNITED STATES,

Plaintiff,

-against- AFFIDAVIT

CARMINE PICCORA, RAYMOND COUGHLIN, NEIL PACILIO, ALBERT GRASSO, CHARLES GREENE and FRED SMITH,

Defendants.
----------x

STATE OF NEW YORK)
COUNTY OF NASSAU) ss:

ANTHONY CANEGALLO, being duly sworn, deposes and says:

That I reside at 261 Oceanside Street, Islip Terrace, New York, and that I was a duly sworn juror serving on a jury of twelve in the above captioned case. I was empaneled and served as a juror for the entire trial and participated in the jury's deliberations and its verdicts which was rendered on July 23, 1974, at about 9:20 p.m.

During the trial, jurors five and eleven made known to the Court that they had vacation plans to leave the country on July 24, 1974 and were assured by the Court that they would not serve beyond July 23, 1974.

The jury's deliberations began on July 23, 1974 at about 12:40 p.m. Both jurors five and eleven made it quite clear to all other jurors that no matter what occurred, they would be leaving on their vacations to Canada on the morning of July 24, 1974.

After one poll of the jury, there were eight jurors in favor of acquittal of all defendants with the exception that I felt defendant RAYMOND COUGHLIN was guilty of the charge of conspiracy and there were four jurors in favor of conviction of all the defendants on all counts.

Thereafter another vote was taken and now ten jurors were in favor of acquittal of all defendants and two jurors (jurors two and twelve) were firmly holding out for conviction of all defendants on all counts.

After much discussion, jurors two and twelve would not change their firm position of guilty on all counts.

Considering the above, and the time was approximately 7:30 p.m., I thought that further discussion was useless and on three separate occasions I told the jury foreman that the jury should report to Judge Costantino that the jury was a hung jury and hopelessly deadlocked.

At this point, juror twelve said that if we so informed the Judge that he could possibly order us back to deliberate for six more hours and may even order us to stay overnight. When jurors five and eleven heard this, they immediately protested to the other jurors. Jurors five and eleven again stated that they had to leave this evening as their planned vacations were to start the very next day. Juror twelve then remarked that he did not care if the jury's deliberations lasted another month as he had no plans.

Therefore, the fact that jurors five and eleven had to leave that evening; the firm stand of jurors two and twelve for conviction of all defendants; the fact that all jurors except myself were against informing the Judge that we were deadlocked and seeing that we did not have ample time to freely deliberate, the ten jurors for acquittal of all defendants except defendant COUGHLIN sought and finally reached a compromise verdict with jurors two and twelve at 9:30 p.m.

If there had not been a pressing time limit for deliberations, I would have held out for a hung jury but due to the facts stated I did not do so.

When I was polled as a juror, I wanted to say that it was not my verdict but because of the circumstances related above I acted otherwise.

Anthony Canegallo
ANTHONY CANEGALLO

Sworn to before me this
15th day of November, 1974

Anthony N. Del Rosso
Notary Public, State of New York
No. 30-5074075
Qualified in Nassau County
Term Expires March 30, 1976

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT
Docket No. 75-1037

THE UNITED STATES,

Plaintiff-Appellee,

vs

RAYMOND COUGHLIN, ALBERT GRASSO,
CHARLES GREENE and FRED SMITH,

Defendants

CARMINE PICCORA and NEIL PACILIO,

Defendants-Appellants.

AFFIDAVIT OF SERVICE BY MAIL

STATE OF NEW YORK)
) SS:
COUNTY OF NEW YORK)

John B. McGetrick, being duly sworn, deposes and says: That he is over twenty-one years of age: That on the 31st day of March 1975 he served three copies of The Brief For Defendants-Appellants Carmine Piccora and Neil Pacilio, on Lauren S. Kahn, Attorney for Plaintiff-Appellee, by enclosing said copies in a fully post-paid wrapper addressed as follows and depositing sa me in The United States Post Office maintained at No. 150 Christopher Street, New York City, New York.

Lauren S. Kahn, Esq.
c/o T. George Gilinsky
P.O. Box 899
Ben Franklin Station
Washington, D.C. 20044

Sworn to before me this
31st day of March 1975

John B McGetrick

QUINTON C. VAN VLECK
Notary Public, State of New York
No. 24-4087465
Qualified in Kings County
Commission Expires March 30, 1975